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Municipal Corporations—Taxpayers' Remedies—Liability of Officers.

Municipal officers, after advertisement as required by statute,[1] awarded construction company a contract for repairs on the city incinerator for a price of $1,370.00, and three days later, without advertising and public letting, awarded said construction company additional work in the further sum of $4,870.61. Taxpayers, alleging that the price of the additional work was exorbitant and was illegally paid, bring suit in their own names, the mayor and city council having refused to sue, to recover for and on behalf of the city. *Held,* the municipal officers, even though they did not act corruptly and maliciously, are jointly and severally bound, with the construction company, to restore to the public treasury the amount by which the contract price exceeded the reasonable value of the work.[2]

When municipal officers wilfully transcend their lawful powers or breach their legal duty in any way which tends to waste the corporate property, there are two questions of interest to taxpayers on whom the loss will ultimately fall: what is the liability of such officers, and how are remedies against them to be enforced?

The doctrine is now almost universally accepted that when the proper public officials fail to take action to prevent or restrain the illegal creation of a public debt, the taxpayers themselves may maintain suit for injunctive relief.[3] North Carolina has evinced a liberal attitude toward such actions.[4] So also when an officer wrongfully retains funds due the county or municipality and the proper authorities fail to collect such funds from him when duly requested to do so, any citizen or taxpayer is authorized by statute to sue in his own name to recover for the benefit of the county or municipality, and he may receive one-third of the amount recovered up to $500.00.[5]

When public funds have been wrongfully disbursed through mere

[1] N. C. CODE ANN. (Michie, 1931) §2830.

[2] Moore v. Lambeth, 207 N. C. 23, 175 S. E. 714 (1934).

[3] Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070 (1879); Blanshard v. City of New York, 141 Misc. Rep. 609, 253 N. Y. S. 419 (1931), *aff'd* 262 N. Y. 5, 186 N. E. 29 (1933) (New York common law *contra* was changed by statute in 1872); Murphey v. Greensboro, 190 N. C. 268, 129 S. E. 614 (1925); Pierce v. Hagans, 79 Ohio St. 9, 86 N. E. 519, (1912); 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) 2763, n. 4.

[4] Murphey v. Greensboro, 190 N. C. 268, 129 S. E. 614 (1925) (averment of request upon officers unnecessary if officers themselves involved in the alleged illegality); Edenton Ice Co. v. Plymouth, 192 N. C. 180, 134 S. E. 449 (1926) (Action should be brought by a taxpayer though he need not be a resident of the town or an individual as distinguished from a corporation).

[5] N. C. CODE ANN. (Michie, 1931) §3206; Waddill v. Masten, 172 N. C. 582, 90 S. E. 694 (1916).

errors of judgment, municipal officers incur no personal liability therefor;[6] but where the losses occur in consequence of acts done in wilful violation of law, officers are personally responsible even though they acted in perfect good faith.[7] Guilty officials may be proceeded against criminally but that does not restore the loss.[8] To recover the property the municipal corporation through its proper officers should institute proceedings.[9] But since the officials who should bring action are frequently the very parties whose alleged illegal acts are complained of, the taxpayer, to have effectual protection, should not be limited to suits for injunctive relief but allowed to maintain action to recover, on behalf of the municipal corporation, funds already unlawfully expended. This extension of the doctrine is supported by a majority of well reasoned decisions.[10] It is definitely and fully adopted in North Carolina by the principal case.[11]

A minority of states, however, have refused to entertain taxpayers' remedial actions on the grounds that the wrong alleged affects the whole community and not specifically those bringing the action;[12] that the cause of action, if any, is in the corporation and only indirectly in the taxpayer;[13] and that to allow such suits would subject the courts as

[6] Osburn v. Stone, 170 Cal. 480, 150 Pac. 367 (1915); Burns v. Essling, 163 Minn. 57, 203 N. W. 605 (1925). 1 DILLON, MUN. CORP. §439.

[7] Burns v. Essling, 163 Minn. 57, 203 N. W. 605 (1925); Jones v. North Wilkesboro, 150 N. C. 646, 64 S. E. 866 (1909); Murphey v. Greensboro, 190 N. C. 268, 129 S. E. 614 (1925). But *cf.* Ellefson v. Smith, 182 Wis. 398, 196 N. W. 834 (1924) (an exception where emergency exists and municipality receives full benefit at a fair price); Vandervoort v. City of Troy, 130 Misc. Rep. 151, 223 N. Y. S. 454 (1927) (Mere illegality is not enough to authorize injunction unless some injury is resultant); Harrison v. New Bern, 193 N. C. 555, 137 S. E. 582 (1927) (Although *ultra vires* contract made, the executed deal must be allowed to stand for and against both parties "where the plainest rules of good faith require it.")

[8] N. C. CODE ANN. (Michie, 1931) §4384 (official misconduct made a misdemeanor for which the officer may be removed from office, fined and imprisoned); State v. Anderson, 196 N. C. 771, 147 S. E. 305 (1929).

[9] Young v. Moor, 144 Ga. 401, 87 S. E. 401 (1929); Brownfield v. Houser, 30 Or. 534, 49 Pac. 843 (1897) (Oregon held the corporation the *only* proper plaintiff until 1912 when taxpayers' suit was recognized in McKenna v. McHaley, 62 Or. 1, 123 Pac. 1069 (1912)). 1 DILLON, MUN. CORP. 2782.

[10] Zuelly v. Casper, 160 Ind. 455, 67 N. E. 103 (1903); Burns v. Van Buskirk, 163 Minn. 48, 203 N. W. 608 (1925); Cathers v. Moores, 78 Neb. 13, 110 N. W. 689 (1908); Land Co. v. McIntyre, 100 Wis. 258, 75 N. W. 964 (1898). *Contra*: Bayley v. Town of Wells, 174 Atl. 459 (Me. 1934); Stephens v. Campbell, 26 Tex. Civ. App. 213, 63 S. W. 161 (1901).

[11] The court had previously indicated what its attitude would be. See Waddill v. Masten, 172 N. C. 582, 905 S. E. 694 (1916); Brown v. Walker, 188 N. C. 52, 123 S. E. 633 (1924). MCINTOSH, N. C. PRACTICE AND PROCEDURE, (1929) 205.

[12] Miller v. Town of Palermo, 12 Kan. 14 (1873); Bayley v. Town of Wells, 174 Atl. 459 (Me. 1934).

[13] Young v. Moor, 144 Ga. 401, 87 S. E. 401 (1915); Stephens v. Campbell, 26 Tex. Civ. App. 213, 63 S. W. 161 (1901).

well as the municipal officials to a multiplicity of suits by dissatisfied taxpayers.[14]

On the other hand it may be pointed out that taxpayers' suits, with certain statutory exceptions, are maintained not for the immediate benefit of the individual taxpayer but in behalf of the municipality,[15] and to deny that taxpayers are proper parties plaintiff is to leave them without remedy while the public funds are wantonly or corruptly dissipated by those in temporary charge of municipal affairs.[16] The purpose of such suits is not to interfere with the exercise of discretionary powers by municipal officers, but the very basis of the taxpayer's action is the refusal of the proper authorities to act when there is some injurious misuse of corporate power.[17]

The majority view, which is supported by the analogy of stockholder's suits where corporate directors refuse to sue,[18] seems to be based on sounder policy, because of the necessity of prompt action to prevent public injury and because the taxpayer's suit is the most direct and often the only means of setting in motion the machinery of the court.[19]

R. MAYNE ALBRIGHT.

Practice and Procedure—Effect of Judgment Pending Appeal as Res Adjudicata

Through his next friend, *A*, an incompetent Indian, brought suit in the Federal District Court against his former guardian, *B*, requesting an accounting. *B* offered in evidence as a bar to *A's* action a judgment of the Oklahoma District Court from which an appeal was pending to the State Supreme Court. The Circuit Court of Appeals sustained the District Court's refusal to admit the judgment as evidence by conforming to the Oklahoma rule that while an appeal is pending a judgment has no force as *res adjudicata*.[1]

The opposite result has been reached in many decisions which grant to a judgment pending an appeal the effect of a bar.[2] Of course, if

[14] Sears v. James, 47 Or. 50, 82 Pac. 14 (1905) (Overruled in McKenna v. McHaley, 62 Or. 1, 123 Pac. 1069 (1912). See note 9, *supra*).

[15] Neacy v. Drew, 176 Wis. 348, 187 N. W. 218 (1922).

[16] Zuelly v. Casper, 160 Ind. 455, 67 N. E. 103 (1903); Willard v. Comstock, 58 Wis. 565, 17 N. W. 401 (1883).

[17] Zuelly v. Casper, 160 Ind. 455, 67 N. E. 103 (1903); Murphey v. Greensboro, 190 N. C. 268, 129 S. E. 614 (1925).

[18] Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827 (1882). 4 DILLON, MUN. CORP. 2766.

[19] 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1095; Note, (1929) 58 A. L. R. 588.

[1] Coppedge v. Clinton, 72 (2d) 531 (C. C. A. 10th, 1934). (Reversed in order that the District Court might determine a question of jurisdiction).

[2] Eastern Building & Loan Ass'n v. Welling, 103 Fed. 352 (C. C. D. S. C., 1900) (South Carolina judgment); Tampa Waterworks Co. v. City of Tampa, 124 Fed.